

The Office of Advocacy recommends that the FCC examine less burdensome alternatives to prevent trafficking such as the rules governing license changes for the provision of cellular telephone service. *See* 47 C.F.R. § 22.39. Those rules have limited trafficking in cellular licenses without preventing cellular telephone providers from making legitimate financial changes to their operations.

The Office of Advocacy concurs that application mills create significant impediments to the licensing of MDS facilities. However, a ban on settlements does not alleviate the backlog of current applications from the mills. Nor will a complete ban on settlements curtail the ingenuity of application mills to circumvent this ban as they have done in other situations.

A more troubling aspect of the Commission's ban is that it eliminates one mechanism that can rapidly eliminate a processing backlog -- complete market settlements. If one applicant or a group can eliminate, through monetary compensation, all competing applications, then the backlog will ease and the Commission staff can devote their scarce resources to awarding licenses where mutually exclusive applications still exist. The Office of Advocacy sees no harm in adopting this approach to reduce the number of competing applications that have been filed with the Commission.

The FCC, rather than prohibiting complete settlements, should adopt regulations that encourage such settlements. One critical element in any such effort is to ensure that no further applications for a particular channel in a particular market have been filed. The Commission's construction of a database and freeze on applications should give competing applicants the opportunity to reach a full-market settlement.²¹

Eliminating the practices of mills will require more than a prohibition on full or partial settlements. The mills must be controlled -- not the application and licensing process. The FCC may have the authority to promulgate such regulations.²² In the absence of such authority or if it wishes to coordinate regulatory activity, it should contact the Federal Trade Commission and request action pursuant to its authority to regulate unfair and deceptive trade practices.²³ 15 U.S.C.

²¹ The Commission might want to extend a freeze on applications subsequent to the completion of the database and provide a window of opportunity to negotiate complete license settlements. To further ensure that the settlement will not be overturned by a subsequent application, the FCC should prohibit any future applications in markets that reached a full settlement during this subsequent freeze.

²² Cf. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (Commission has authority to regulate cable television as ancillary to its regulatory responsibilities for broadcast television).

²³ The Federal Trade Commission has conducted investigations of some of the application mills; civil complaints have been filed as a result. Carnevale, *Fraud Complaints Grow in Young Wireless-Cable Field*, Wall St. J., June 24, 1992, at B2, col. 3.

(continued...)

§ 45. The Office of Advocacy would be willing to assist the FCC in requesting action by the Federal Trade Commission.

Finally, the Commission requested comment on awarding licenses by lottery through metropolitan and rural service areas. These demographic-based service areas are arbitrary and have little relation to the engineering of MDS systems. The change to a lottery system based on metropolitan and rural service areas will be as disruptive as modifications to the interference requirements. For those same reasons, the Office of Advocacy cannot support this revision to the Commission's licensing procedures.²⁴

D. Compliance with the Regulatory Flexibility Act

The Commission recognizes that the proposed rules could have a significant economic impact on a substantial number of small entities. We agree and believe that the comments will demonstrate the potential harm to small businesses that will occur if the Commission's proposal is adopted without alteration. The FCC, pursuant to the RFA, must perform a final regulatory

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Nevertheless, more generic action may be required to solve this problem.

²⁴ Even if the FCC adopts this procedure, it should not conduct the lotteries based on the size of market in descending size order. The Commission either should conduct lotteries for those areas with the most applications or, preferably, in those areas currently underserved by conventional cable systems.

flexibility analysis. That analysis should examine the impact of the proposal on the ability of wireless cable operators to develop viable systems and not on the celerity with which the Commission can reduce its licensing backlog. Then the Commission should examine a variety of alternatives, including those explicated above, that ensure the development of a sound and competitive wireless cable industry. The Office of Advocacy stands ready to assist the Commission in this effort.

IV. *Conclusion*

The Office of Advocacy supports the Commission's effort to reduce the accumulation of MDS applications. Removal of this backlog with all deliberate speed is critical to the future development of a wireless cable industry that can compete against conventional cable services. However, the Office of Advocacy cautions the FCC that haste should not blind it to the primary objective of its rulemaking -- the development of wireless cable systems.

To this end, the Office of Advocacy believes that many of the changes suggested by the Commission will be detrimental to current applicants and tentative selectees. Instead of eliminating the current amassment of applications through the

creation of a new set of problems, the FCC should fine tune its current regulations and assign sufficient resources to its Mass Media Bureau to reduce or eliminate the backlog.

Respectfully submitted,

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